

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
June 2000 Session

**STATE OF TENNESSEE v. JORGE OBDULIO HERRERA**

**Direct Appeal from the Criminal Court for Sullivan County  
No. S40,531, Phyllis H. Miller, Trial Judge**

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**No. E1999-00118-CCA-R3-CD-Decided July 20, 2000**

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Pursuant to a plea agreement, the appellant entered a “best interest” plea to the offense of attempted rape of a child and received a sentence of eight years. Following a sentencing hearing the trial court ordered that the appellant’s sentence be served in the Department of Correction. On appeal, the appellant contends (1) the trial court erred in denying an alternative sentence and (2) he is entitled to sentence credits for time spent in Immigration and Naturalization Service (INS) custody. After review, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Criminal Court affirmed.**

DAVID G. HAYES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., J. and NORMA MCGEE OGLE, J., joined.

Terry C. Frye, Bristol, Virginia, for the appellant, Jorge Obdulio Herrera.

Paul G. Summers, Attorney General and Reporter, Michael Moore, Solicitor General, Patricia C. Kussmann, Assistant Attorney General, H. Greeley Welles, Jr., District Attorney General, and Barry Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The appellant, Jorge Obdulio Herrera, was indicted in August, 1997, by the Sullivan County Grand Jury for rape of a child, a class A felony. Under the terms of a negotiated plea agreement, the appellant entered a “best interest” or Alford plea to the reduced offense of criminal attempt to commit rape of a child in exchange for a sentence of eight years. The manner of service of the sentence was to be determined by the trial court. Following a sentencing hearing, the trial court denied the appellant’s request for alternative sentencing, ordering total confinement, and denied a request for sentence credits during a period in which the appellant was detained in Immigration and Naturalization Service (INS) custody. The appellant appeals these rulings.

After review of the record, we affirm.

## ANALYSIS

In his first issue, the appellant argues that the trial court erred in denying him an alternative sentence. As such our review of this issue is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). A *de novo* review obviously requires us to examine the “nature and characteristics of the criminal conduct involved.” Tenn. Code Ann. § 40-35-210(b)(4). In this case, we are precluded from conducting a review of the underlying facts supporting the appellant’s conviction because those facts which would have been presented at the guilty plea hearing were not included in the record. The “nature and circumstances” of child molestation cases are particularly relevant to sentencing determinations as they relate to the aggravated nature of the crime, residual harm to the victim, the relationship between victim and offender, protection from the community and risk of sexual re-offending.

Moreover, at the sentencing hearing, the appellant, relying upon his “best interest” plea, persistently denied any sexual contact or wrongdoing with the minor victim. We have repeatedly held that failure to include the transcript of the guilty plea hearing in the record prohibits this court from conducting a meaningful *de novo* review of the sentence.<sup>1</sup> The obligation of preparing a

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<sup>1</sup>On occasion, we are able to reconstruct from “bits and pieces” of the record on appeal an undisputed version of the factual events of the crime. In this case, we are unable to do so. The pre-sentence report contains the following excerpt from the Kingsport Police Department Incident report:

[The victim] who is (5) years of age states that after Christmas break, 1995, her mother was drinking with several Mexican males, one by the name of Jorge (George) came into her room. [Victim] states that she was woke up by Jorge, when he touched her on her private part. [Victim] states that Jorge thought it was her mom. [Victim] related this story to her mother, Sharon Vaughn the same night.

A medical examination of the victim which was conducted approximately six months after the offense revealed the following impression . . . “[T]his exam is highly suspicious for some form of trauma involving damage to the hymen.”

The sexual offender risk assessment relates in pertinent part: The allegations are that Mr. Herrera digitally penetrated a five year old female’s vagina on one (1) occasion in December, 1995 . . . . Specifically, the victim reported that Mr. Herrera came into her bedroom at night when she was asleep. She was laying on her stomach and Mr. Herrera fondled and then digitally penetrated her vagina. When he left the bedroom, the identified victim reports going into the bathroom crying and disclosed to her mother what Mr. Herrera had done.

The appellant admits that he visited the house of the victim’s mother along with several of his friends after a night of drinking. The appellant and the victim’s mother had been involved in a “sexual relationship” for approximately one year. On this occasion, the appellant related that he was at his female friend’s house no more than ten minutes after finding her with another man in her room. In the absence of a complete record, we make no attempt to reconcile the

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complete and adequate record for the issues presented on appeal rest upon the appealing party. Tenn. R. App. P. 24(b). If the appellate record is inadequate, the reviewing court must presume that the trial judge ruled correctly. See State v. Ivy, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993).

The facts do establish that, at the time of sentencing, the appellant was 29 years of age. At age 21, he left his native country of Honduras and entered this country illegally. Since entering the United States, he has worked at various jobs in Texas, Florida, Virginia and Tennessee. He married a U.S. citizen in 1996 and is the father of two children from this union. As a result of his marriage to a U.S. citizen, his immigration status was changed from that of illegal alien to legal alien with a right to work permit. The appellant has no significant criminal history. He has some difficulty understanding and communicating in English and was appointed an interpreter at the sentencing hearing.

Because the appellant was convicted of a class B felony offense, he is not entitled to the presumption of an alternative sentence. See Tenn. Code Ann. § 40-35-102(6). Moreover, because the incomplete record prevents this court's review of the circumstances of the offense, we cannot conclude that the evidence in the record preponderates against the trial court's ruling. The appellant has the burden of showing the sentence is improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d). He has failed to do so. This issue is without merit.

In his second issue, the appellant contends that the trial court erred in not allowing him sentence credits for the time that he spent in INS custody. Following entry of his plea in January, 1999, the appellant remained at liberty, having made bail in the sum of \$30,000. On April 14, 1999, the appellant was placed in federal custody pursuant to an INS detainer until August 23, 1999, when he was returned to the Sullivan County jail. It is this approximate four and one-half months period that he now requests as time credit to be applied against his sentence.

This issue is controlled by Tenn. Code Ann. § 40-23-101(c), which provides:

The trial court shall, at the time the sentence is imposed and the defendant is committed to jail, the workhouse or the state penitentiary for imprisonment, render the judgment of the court so as to allow the defendant credit on the sentence for any period of time for which the defendant was committed and held in the city jail or

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"nature and circumstances" of the offense other than to note the dilemma caused by an incomplete record. Moreover, we note that the sufficiency of the evidence is not at issue as a result of the appellant's best interest plea. A guilty plea (best interest plea) is in itself a conviction and is conclusive as to the appellant's guilt.

juvenile court detention prior to waiver of juvenile court jurisdiction, or county jail or workhouse, pending arraignment and trial. The defendant shall also receive credit on the sentence for the time served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which the defendant was tried.

First, we note that the appellant's INS detention was not served in a facility of this state or county and that he was placed in federal custody during a time in which he remained free on bond from his state conviction. Moreover, his INS detention arose not "out of" his state conviction but, rather, as a result of his conviction placing him in violation of federal immigration laws. We hold that the appellant is not entitled to seek sentence credits to be applied against a state sentence for time spent while confined on a detainer issued by the federal government acting through the INS.

For the foregoing reasons, the judgment of the trial court is affirmed.

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DAVID G. HAYES, JUDGE